

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DENNIS M. BUCKOVETZ,

Plaintiff,

v.

DEPARTMENT OF THE NAVY,

Defendants.

Case No.: 18cv2736-WQH-KSC

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss filed by Defendant Department of the Navy. (ECF No. 9).

I. PROCEDURAL BACKGROUND

On December 5, 2018, Plaintiff Dennis Buckovetz filed a Complaint against Defendant Department of the Navy for violation of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B). (ECF No. 1). Plaintiff alleges that Defendant closed a 2018 records request made by Plaintiff because the request was duplicative of a 2015 request made by Plaintiff, in accordance with Secretary of the Navy Instruction (SECNAVINST) 5720.42F. Plaintiff alleges that the response to the 2015 records request

1 was incomplete, “[s]o the 2018 request was done to allow for a comparison with the email
 2 records provided in 2015.” *Id.* at 3.

3 On May 6, 2019, the Court issued an Order notifying Plaintiff that the action would
 4 be dismissed “unless, on or before May 28, 2019, Plaintiff files either (1) proof that
 5 service of the summons and complaint was timely effectuated in compliance with to
 6 Rule 4(i), or (2) a declaration under penalty of perjury showing good cause for failure to
 7 timely effect service upon the Defendant accompanied by a motion for leave to serve
 8 process outside of the 90-day period.” (ECF No. 7 at 3).

9 On May 15, 2019, Plaintiff filed a proof of service document. (ECF No. 8).

10 On June 17, 2019, Defendant filed the Motion to Dismiss on the grounds that
 11 Plaintiff failed to administratively exhaust the claims regarding Plaintiff’s 2015 FOIA
 12 request, and on the grounds that the claims regarding Plaintiff’s 2018 FOIA request and
 13 the SECNAVINST 5720.42F policy to close duplicative FOIA requests are moot because
 14 Defendant has now released documents in response to Plaintiff’s 2018 FOIA request. (ECF
 15 No. 9).

16 On July 5, 2019, Plaintiff filed a response in opposition to the Motion to Dismiss.
 17 (ECF No. 10).

18 On July 15, 2019, Defendant filed a reply in support of the Motion to Dismiss, stating
 19 that “Defendant withdraws its administrative exhaustion argument, and agrees that Plaintiff
 20 exhausted administrative remedies with respect to his earlier, identical 2015 FOIA
 21 request,” and that “Defendant does not oppose litigation moving forward as to those
 22 claims.” (ECF No. 11 at 2). Defendant stated that “Defendant now moves to only partially
 23 dismiss Plaintiff’s complaint” on mootness grounds. *Id.*

24 II. DISCUSSION

25 Defendant contends that Plaintiff’s claims based on the 2018 FOIA request and
 26 administrative closure of duplicative FOIA requests pursuant to SECNAVINST 5720.42F

1 are moot because Defendant released all documents responsive to Plaintiff's 2018 FOIA
 2 request on June 14, 2019. Defendant contends that Plaintiff cannot receive relief related
 3 to SECNAVINST 5720.42F because Defendant "is not relying on" the policy and any
 4 ruling on SECNAVINST 5720.42F would not affect the matter before the Court. (ECF
 5 No. 11 at 3). Plaintiff contends that his claims are not moot because Defendant has not
 6 released all responsive documents.

7 "In general, when an administrative agency has performed the action sought by a
 8 plaintiff in litigation, a federal court lacks the ability to grant effective relief, and the claim
 9 is moot." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173
 10 (9th Cir. 2009) (quotation omitted). However, "the mere cessation of illegal activity in
 11 response to pending litigation does not moot a case, unless the party alleging mootness can
 12 show that the 'allegedly wrongful behavior could not reasonably be expected to recur.' . . .
 13 . The party alleging mootness bears a 'heavy burden' in seeking dismissal. . . . It must show
 14 that it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit
 15 is dismissed." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,
 16 528 U.S. 167, 189, (2000)). "Most FOIA cases are resolved by the district court on
 17 summary judgment, with the district court entering judgment as a matter of law." *Animal
 18 Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc);
 19 *see also Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) ("Generally, FOIA
 20 cases should be handled on motions for summary judgment . . .") (quoting *Miscavige v.
 21 Internal Revenue Serv.*, 2 F.3d 366, 369 (11th Cir. 1993)).

22 The Court of Appeals has addressed Article III standing and mootness in the context
 23 of FOIA as follows:

24 [T]he Article III requirements for a *specific* FOIA request claim and a *pattern*
 25 or *practice* claim differ from each other. We have recognized two separate
 26 claims that complainants can bring against an agency under FOIA. The first
 27 is a suit where a plaintiff attacks a specific agency action for (1) "improperly"
 28 (2) "withheld" (3) "agency records." *Kissinger v. Reporters Comm. for*

1 *Freedom of the Press*, 445 U.S. 136, 150 (1980). For specific FOIA request
 2 claims, after the agency produces all non-exempt documents and the court
 3 confirms the agency's proper invocation of an exemption, the specific FOIA
 4 claim is moot because the injury has been remedied. *See, e.g., Perry v. Block*,
 5 684 F.2d 121, 125 (D.C. Cir. 1982) ("[I]f we are convinced that appellees
 6 have, however belatedly, released all nonexempt material, we have no further
 7 judicial function to perform under the FOIA."); *see also Papa v. United States*,
 8 281 F.3d 1004, 1013 & n. 42 (9th Cir. 2002). . . .

9 [W]here a plaintiff alleges a pattern or practice of FOIA violations and seeks
 10 declaratory or injunctive relief, regardless of whether his specific FOIA
 11 requests have been mooted, the plaintiff has shown injury in fact if he
 12 demonstrates the three following prongs: (1) the agency's FOIA violation was
 13 not merely an isolated incident, (2) the plaintiff was personally harmed by the
 14 alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future
 15 harm by the policy or practice. . . . In other words, a pattern or practice claim
 16 is not necessarily mooted by an agency's production of documents.

17 *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1102–03 (9th Cir. 2016).

18 In this case, Defendant seeks to dismiss Plaintiff's claims as moot because
 19 Defendant provided documents responsive to Plaintiff's 2018 FOIA request without
 20 relying on SECNAVINST 5720.42F. The Court determines that Defendant "alleg[es]
 21 mootness" based on Defendant's voluntary conduct and "bears a 'heavy burden' in seeking
 22 dismissal" to "show that it is 'absolutely clear' that the allegedly wrongful behavior will
 23 not recur if the lawsuit is dismissed." *See Rosemere*, 581 F.3d at 1173 (quoting *Laidlaw*,
 24 528 U.S. at 189).

25 Plaintiff seeks relief including an order requiring "the Navy to disclose the records
 26 requested . . . in their entireties and make copies available to me." (ECF No. 1 ¶ 16).
 27 Defendant provides the declaration of Cinthia Christopher, the FOIA coordinator for the
 28 Marine Corps Recruit Depot (MCRD) in San Diego. Christopher states in the declaration:

29 On October 19, 2018, MCRD received FOIA request DON-USMC-2019-
 30 000608 from an individual with the same address as Plaintiff, requesting the
 31 same information as Plaintiff's 2015 and 2018 FOIA requests. While
 32 searching for documents responsive to that individual's request, MCRD found

1 an additional 106 pages of previously unidentified documents. MCRD
 2 provided those documents to the requester, and on June 14, 2019, also
 3 provided those additional documents to Plaintiff.

4 (Christopher Decl. ¶ 9, ECF No. 9-2). Plaintiff maintains that certain documents were
 5 improperly excluded from the documents released in response to his 2018 FOIA request.
 6 The Court finds that the record at this stage in the litigation does not support a finding that
 7 Plaintiff's claims are moot with respect to his 2018 FOIA request. *See Hajro*, 811 F.3d at
 8 1103 (“[W]here a plaintiff attacks a specific agency action . . . after the agency produces
 9 all non-exempt documents and the court confirms the agency’s proper invocation of an
 10 exemption, the specific FOIA claim is moot because the injury has been remedied.”); *see also Lane*, 523 F.3d at 1134 (“Generally, FOIA cases should be handled on motions for
 11 summary judgment . . .”).
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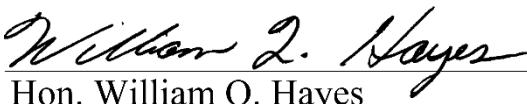
13 In addition, Plaintiff seeks relief including a declaration that “the Navy’s duplicate
 14 request policy as stated in SECNAVINST 5720.42F [is] unlawful” and an order requiring
 15 “the Navy to cease complying with the provisions of SECNAVINST 5720.42F that
 16 authorize the administrative closure of duplicate requests.” (ECF No. 1 ¶¶ 14–15).
 17 Plaintiff alleges that “duplicate requests have been identified and reported in the Navy’s
 18 annual FOIA report to the DOJ since 1999.” (ECF No. 1 ¶ 12). The Court finds that the
 19 record at this stage in the litigation does not support a finding that Plaintiff’s claims are
 20 moot with respect to with respect to SECNAVINST 5720.42F. *See Hajro*, 811 F.3d at
 21 1103 (stating that “where a plaintiff alleges a pattern or practice of FOIA violations and
 22 seeks declaratory or injunctive relief,” the claims are not moot if the plaintiff demonstrates
 23 “(1) the agency’s FOIA violation was not merely an isolated incident, (2) the plaintiff was
 24 personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient
 25 likelihood of future harm by the policy or practice”); *see also Rosemere*, 581 F.3d at 1173
 26 (noting that a party alleging mootness based on the party’s own voluntary actions, carries
 27
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1 a “heavy burden” to “show that it is ‘absolutely clear’ that the allegedly wrongful behavior
2 will not recur”).¹

3 **III. CONCLUSION**

4 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant
5 Department of the Navy (ECF No. 9) is DENIED.

6 Dated: July 31, 2019


7 Hon. William Q. Hayes
8 United States District Court

27 ¹ The Motion for Leave to File Surreply filed by Plaintiff (ECF No. 12) is denied as moot.
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